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In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT A. GITTENS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief Appellate Defense Division
Counsel of Record

ERIC N. EKLUND
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

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QUESTIONS PRESENTED

Whether the Court of Military Appeals erred in holding that the military judge's failure to *sua sponte* provide an accomplice instruction did not constitute plain error notwithstanding the fact that the evidence indicated that key government witnesses were accomplices.

Whether the Court of Military Appeals erred in holding that the test for the admissibility of rebuttal testimony tainted by a witness' prior in-court exposure to evidence is whether there was "bad faith" on the part of the party seeking to introduce the tainted testimony.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Roberto A. Gittens, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 17, 1994.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals issued on June 17, 1994 is reported at 39 MJ 328 (C.M.A. 1993) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on March 26, 1992 is reported at 36 MJ 594 (A.F.C.M.R. 1992) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 17 June 1994. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

The appellant was charged with rape, sodomy, and adultery, but was ultimately only convicted of the lesser included charge of attempted rape. All of the charges stemmed from a party the appellant attended late on 12 May 1990, at the home of Andrea Huizar, located on George AFB, California.

The prosecution's case relied on the testimony of several individuals, Andrea Huizar, Jennifer Williams, Dexter Harris, Sgt Cecil Henderson, Melvin Rasberry II, and Cory Lyons. Andrea Huizar, the complaining witness, testified that on the night of 12 May 1990, she and Jennifer Williams had gone to the NCO club on base where she met Richard Williams (her boyfriend), Melvin Rasberry, and another individual named Michael St. Julian. R. 183. At 1:35 am, after a few sips of Margarita, and after the club had closed, Andrea invited Lyons, Rasberry, Williams, and "the guys from Edwards [AFB]" over to her house on base for a "get-together." R. 184. Andrea's parents and sister were on retreat at the time. R. 185. Upon returning to her home, Andrea and the appellant went to the shoppette to get ice for the party. While there, she asked the appellant to "pretend like [they] were together," so a guy who had been asking her to go out for a while "would stop [asking her] to go out." R. 184. Upon her return home, Andrea drank some gin and orange juice the appellant had prepared, then went on to play "quarters", a drinking game, during which she had four shots of tequila and E & J, the latter drink apparently a brand of whisky. R. 85-86.

The next thing Andrea remembered is "feeling a sharp pain in her behind" which woke her up, and then telling "someone to stop and leave me alone," but she could not identify the person she told this to. R. 186. Andrea could

tell the bed was not moved, and then she heard two voices, "but only one was talking and he was saying "Hurry up. . . ," you know,". . . because I'm next." R. 187. She then woke up dizzy Sunday afternoon, her sweater and bra having been pushed up. R. 187-88. Andrea originally thought something had happened between her and Richard Williams, her boyfriend. R. 188. Four days later, she finally reported to someone in authority that something had occurred. R. 188.

Andrea's friend of four years, Jennifer Williams, testified regarding her latest version of what she said happened late on 12 May 1990. Jennifer stated that after Andrea had gone to sleep, she gave Marcus (another party-goer) a glass of water because he felt ill. R. 83. Jennifer returned to the living room for about four minutes, and then went into the kitchen where she saw Michael Saint Julian (still another party-goer) and the appellant. R. 88. Dexter Harris then came and got Jennifer and took her to Anna's (Andrea's sister's) room where Andrea was sleeping, exclaiming, "I can't believe what they're doing to her." R. 88-89, 98. There she say Cory Lyons on his knees holding Andrea's hand, as well as Melvin Rasberry in the back. Both Lyons and Rasberry had been drinking. R. 89. Jennifer asked them "what the fuck they were doing in there with her," R. 89, and then observed Andrea "making a whining sound," and was then told by either Lyons or Rasberry that "she's calling for Richard." R. 89. Two or three minutes later, after returning to the kitchen, Jennifer asked the appellant to remove Lyons and Rasberry from the room where Andrea was located. R. 89, 94.

Lyons came back into the living room, Harris "was still laying around the house," Rasberry was in either Anna's room, or Andrea's room where "the radio was," and Jennifer was in the kitchen when, according to Jennifer, she allegedly heard Andrea repeatedly scream "You get off of

me," and "your hurting me." R. 90. Jennifer then went to see what was wrong with Andrea, and when she tried to open the door to where Andrea was sleeping she could not turn the doorknob. R. 90. She got the door open about 12 inches when she said the bed blocked up against the door. R. 91. The bed then allegedly turned back to its normal position 90 degrees perpendicular to the door as Jennifer got the door open. R. 91. Due to the way the door swings, the pressure of Jennifer and Harris pushing on the door was not responsible for the bed returning to its normal position. R. 92. Jennifer then allegedly saw a person on the other side of the bed with his pants and underwear down. Although there was "no light at all," she testified she could see the individual's white underwear, thereby allowing Jennifer to see that the person's pants and underwear were down. R. 92. She did not notice if the person had an erection or anything along those lines. R. 103. Jennifer stated that she recognized the person in the room as the appellant because the person in the room was wearing a pair of "black glasses" and "he was the only [one] who had his glasses on that night." R. 93. The person in the room then allegedly pulled up his pants, told Jennifer "[s]he's calling for Richard" and left. R. 92. Jennifer did not see anybody else in the room. R. 95.

Jennifer then approached Andrea, who was naked from her neck down, who then allegedly told her, "I can't believe he did this to me. He's supposed to be my friend . . . Bobby, the black one. He was on top of me." R. 94. Andrea also allegedly told Jennifer that "he hurt her." R. 94. Jennifer then covered Andrea up, told her that "they're not gonna come in here and bother you anymore," and shut the door of the room. R. 94. She then returned to the living room and saw Rasberry, Harris, Lyons, and the appellant. She also saw Richard Williams passed out on the couch. Rasberry went to the back room to retrieve his shirt, then everyone except Jennifer left the house. R. 94.

Dexter Harris provided contradictory testimony at the appellant's court-martial. Harris stated that he attended Andrea's party on 12 May 1989, and that he became intoxicated. R. 122. After playing quarters, Harris testified that he went and passed out in Anna's room, (where Andrea eventually passed out), but then was told by Andrea to go to another bedroom in the house, (marked "xy" on App. Ex. II.) Nevertheless, Harris returned three times to the room where Andrea was passed out. R. 123. On one of the occasions he returned to Anna's bedroom where Andrea was sleeping, Harris remembered seeing the appellant and two other guys in the room. R. 123, 130. During another time he returned to the room he allegedly saw the appellant alone with Andrea, sitting at the foot of the bed. The appellant was away from her and facing the dresser. R. 124. Both the appellant and Andrea were dressed. R. 125. The final time Harris went to Anna's room where Andrea was passed out was after he told Jennifer that "there were guys back there 'pulling a train' on Andrea." R. 128. He and Jennifer subsequently went back to investigate, and at first she could not get the door open. R. 128. Harris was right beside her when she tried to get the door open. When she finally "busted the door open," Harris was right behind her. R. 128. He did not see the bed turned sideways as the door was being forced open, and did not see the bed in front of the door when he entered the room. 128-29. After entering the room, Harris remembered that there were three other guys in the room. R. 129. Harris did not see the appellant with his pants down, R. 130, nor did he see the appellant touch or doing anything sexually inappropriate to Andrea. R. 133.

Harris admitted that he was alone with Andrea at one time, but just "for a second or two," and denied being on the bed with Andrea. Harris also denied taking any of his clothes off, and doing anything of a sexual nature, such as

masturbating. R. 133-34. He also denied getting anyone to come into the room to show them someone having sex with Andrea. R. 134.

Rasberry also testified on behalf of the prosecution. He testified that he, too, was at Andrea's 12 May 1990 party and that he drank enough to be intoxicated. R. 145. While playing quarters, Rasberry went to the restroom. While walking to the restroom, he twice heard something to the effect of "[t]ake it out, it's hurting." R. 145. Five minutes later, he emerged from the bathroom and saw the appellant in the hallway. He looked in the bedroom and saw Lyons, Rasberry's "best friend" and roommate, R. 156, 160, comforting Andrea. R. 145, 152. Andrea was fully dressed at that time. R. 156. Harris was also in the bedroom, at the end of the bed. R. 152. Lyons at that point told him to go to the car. R. 152. After waiting five minutes, Rasberry went back inside. R. 152. He then met Lyons and the appellant, but they could not find Harris. R. 157. Rasberry then went back to Anna's room where Andrea was sleeping and saw Harris "playing with himself." R. 157. Rasberry and Lyons finally got Harris out of the room to the car. In the car, Harris said something about "getting some" and asked the appellant if his was "as good as mine." R. 158. Rasberry also testified that there were upwards of 15 black men who attended the party. R. 159.

Lyons also testified as a prosecution witness. After playing quarters at Andrea's 12 May 1990 party, Lyons went to the bathroom. R. 170. Afterwards, he went into the bedroom to say good bye to Andrea. R. 170, 179. Harris was passed out in the corner. R. 170. The appellant was not in the room at the time. R. 179. In fact, during the entire night, Lyons never saw the appellant in Anna's room. R. 179. When Lyons went into the bedroom, he comforted

Andrea by talking to her because she was "hysterical." R. 170. While comforting Andrea, Lyons testified that Jennifer did not come in and say "what the fuck are you doing in here." R. 180. He then left the room and got "everybody" outside of the house, "everybody" being Harris, Rasberry, and the appellant. They got in the car, where the appellant allegedly said, "I got some." R. 171. He did not remember anything else the appellant might have have said. R. 172. Under examination by the trial counsel, Lyons read from an unsworn statement he gave the OSI in the past in which he wrote "Bobby's words were "Man we ran a train on Andrea.' " R. 173. He denied being together with Rasberry in the room with Andrea. R. 176. Lyons also denied seeing Harris playing with himself or masturbating on the bed, R. 177, or having to go back in Anna's room to get Harris. R. 177. He also testified at the Article 32 investigation, while under oath, that he did not remember and did not say anything about the appellant "pulling a train on Andrea." R. 175. Although he lives on block away from Andrea's house, he does not remember how he got home. R. 178.

Sgt Cecil Henderson, who is assigned to Edwards AFB, also attended Andrea's 12 May 1990 party and also testified for the prosecution. He stated that those at the party were having a good time drinking and laughing. Sgt Henderson had no more then two drinks the entire night. R. 137. He was in the living room, kitchen and outside the house during the party, and did not go to any of the other rooms. He only went to the rear of the house when he was motioned there by someone at about the end of the night. R. 137. When he went down the hall to see what the person wanted, he saw somebody on top of Anna's bed. R. 139. Henderson saw a young woman on her stomach and someone behind her engaging in sexual intercourse from the rear. R. 140. As he got to the door, someone screamed to

the person who motioned him to the door to "shut the door," and then the door was slammed in Henderson's face. R. 139. The woman was saying "you're supposed to be my friend." R. 139. Neither the person who motioned for Henderson to approach the room, nor the person he saw in Anna's room on top of the woman, was the appellant. R. 140, 142. Although the OSI told Henderson that the person who motioned to him was Harris, Henderson testified that he was not sure it was him. R. 142.

Testifying for the defense, Richard Williams stated that the day after the party, he had a telephone conversation with Andrea in which she asked him if he knew what had happened and "who it was." R. 207. Williams replied that if he had known what was going on, he "wouldn't have let it happen." R. 207. Andrea then said, "But Richard, the bad thing about it is I don't know if I wanted it or not." R. 207. Over defense objection, Andrea's sister, Anna Huizar was allowed to testify, despite the fact that she was present in the courtroom and heard the entire testimony that preceded her, including that of Williams. R. 215. She testified that she was present during a phone call Andrea had with Williams and that during that particular phone call her sister never made the statement to which Williams testified. R. 221.

REASONS FOR GRANTING THE WRIT

I. THE JUDGE ERRED, TO THE PREJUDICE OF THE APPELLANT, BY FAILING TO GIVE AN ACCOMPLICE TESTIMONY INSTRUCTION DESPITE THE FACT THAT SEVERAL WITNESSES WERE ACCOMPLICES.

Despite the fact that the evidence indicated that the witnesses Lyons, Rassberry, and Harris were culpably involved in the offenses for which the appellant was stand-

ing trial, the judge failed to *sua sponte* give an accomplice instruction to the members. He thus committed plain error pursuant to R.C.M. 920(f) which states that: "Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error . . ." The Air Force Court of Military Review found that plain error was not committed *sub judice* because the "primary case against the appellant rested on the testimony of J.W. [Jennifer] and the victim. Moreover, the testimony of the accomplices, if so they were, was corroborated by this testimony." *Gittens,* 36 M.J. at 597. The Court of Military Appeals determined that "On this bizarre record, the evidence simply fails to **suggest** which, if any, of these individuals might have been appellant's accomplices." 39 M.J. at 331 (emphasis added). The court went on to note that, although a military judge's failure to *sua sponte* provide an accomplice instruction could still be plain error in some instances, under the facts of this case, the military judge's omission did not constitute plain error. *Id.* The lower courts erred.

The Court of Military Appeals has previously defined an accomplice as one who was culpably involved in the crime, and thus could have been prosecuted for the same offenses for which an accused is charged. *United States v. McKinnie,* 32 M.J. 141, 143 (C.M.A. 1991); *United States v. Scoles,* 33 C.M.R. 226, 231 (C.M.A. 1963); *United States v. Allums,* 18 C.M.R. 59, 62 (C.M.A. 1955); *United States v. Oxford,* 21 M.J. 983, 985 (N.M.C.M.R. 1986). Such an instruction is critical since, as the Court of Military Appeals noted in *United States v. Gillette,* 35 M.J. 468 (C.M.A. 1992):

> "Historically, accomplice testimony has been viewed with suspicion and with a grain of

> skepticism so as to maintain the fair administration of justice. 7 Wigmore, Evidence 2057 at 417 (Dhadbourn rev. 1978); *Phelps v. United States,* 252 F.2d 49, 52 (5th Cir. 1958). *See also United States v. Leonard,* 494 F.2d 955, 974 (D.C. Cir. 1974) (Bazelon, C.J. concurring in part and dissenting in part). Courts have sought to highlight these suspicions by warning factfinders about such testimony through use of an accomplice instruction. Indeed, questions about the credibility of witnesses who are considered accomplices has spurred the need for "careful instructions" on how to interpret such testimony. *On Lee v. United States,* 343 U.S. 747, 755, 72 S.Ct. 967, 972-73, 96 L.Ed. 1270 (1952); *See Cool v. United States,* 409 U.S. 100, 103, 93 S.Ct. 354, 356-7, 34 L.Ed.2d 335 (1972); *Washington v. Texas,* 388 U.S. 14, 22, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967).

35 M.J. at 470. Contrary to the opinion of the Court of Military Appeals, the evidence produced at trial does more than simply "suggest" that Rasberry, Lyons, and Harris were not mere bystanders, but were likely culpable for the charged offenses in this case, sufficient evidence, in fact, for the issue to have been submitted to the members for resolution in the form of an accomplice instruction. *United States v. Harrison,* 5 M.J. 693, 694 (A.F.C.M.R. 1978); *United States v. Hopewell,* 4 M.J. 806, 807 (A.F.C.M.R. 1977). As previously noted by the Court of Military Appeals in *Gillette,* the members should have been instructed on how to determine whether a witness is an accomplice, and the standard instruction regarding the suspect credibility of accomplice testimony.

The evidence shows that these witnesses, and not the appellant, were the likely perpetrators of any wrongdoing that might have occurred on 12 May 1990. Harris, Rasberry, and Lyons were all at Andrea's party, and were either intoxicated before or became intoxicated during the course of the evening. R. 122, 145, 169. Harris was seen masturbating or playing with himself next to Andrea, R. 157, and he himself admitted returning to Anna's room where Andrea was sleeping no less then three times after having earlier passed out from intoxication. R. 123. Harris, in turn, testified he told Jennifer that other "guys" in Anna's room were "pulling a train" on Andrea. R. 128. His disclaimer that despite that statement, he ". . . didn't see no one doing nothing, I didn't see it," R. 128, rings hollow. Finally, Harris's guilty conscience revealed itself in the form of his anxious questioning of Jennifer as to what she might have said about the party, and what she might have told the OSI. R. 107.

The evidence also points to Lyons and Rasberry as the culpable parties, the "they" in all the statements at bar. Both were observed in Anna's room by Andrea, and they evidently had been enjoying themselves because the appellant had to assist in their ejection from the room at Jennifer's request. R. 89. Lyons attempted to deflect this evidence, denying being in the room with Rasberry, R. 176, denying that Jennifer had come in and said "what the fuck are you doing in here," R. 180, and casting blame on the appellant by alleging he said "I got some," R. 171, or "man, we ran a train on Andrea," depending on what version of his you believe. According to Rasberry, Lyon's best friend, when he became suspicious upon hearing the statement "it's hurting, take it out," in a nonhysterical tone, R. 155, emanating from the room, he walked in on Lyons and Harris in the bedroom and was told by Lyons to go to the car. Rasberry also never admitted being in the

room alone with Lyons and Andrea. He did admit however, that the OSI pressured him to focus in on the appellant, and that they showed him a picture of the appellant and stated, "we got him." R. 158. He also failed to testify at the Article 32 hearing in this case. R. 144.

Because one of the issues before the appellant's court-martial was whether the appellant could be identified as one of the person(a) who had inappropriate sexual conduct with Andrea, he was in the same position as the accused in *Scoles,* wherein the issue was whether the accused "could be identified as one of the group of soldiers who actually stole and sold the gasoline in question." *Supra* 33 C.M.R. at 228. Rasberry, Lyons, and Harris, for their part, were in a similar position as the German witnesses who had knowingly purchased Army gasoline from the accused, but whom the government unsuccessfully argued were not accomplices. *Id.* at 230. Because Rasberry, Lyons and Harris were "culpably involved in the crime with which the [appellant] was charged," they should have been, like the German witnesses in *Scoles,* the subject of an accomplice instruction to the members. *Id.* at 231. Indeed, the purpose of the accomplice instruction is to "call the court members' attention to a matter specifically affecting the witness' credibility, i.e., his motive to falsify his testimony in whole or in part," because "a skeptical approach to accomplice testimony is a mark of the fair administration of justice." *Id.* In light of the foregoing, the military judge had a *sua sponte* duty to give an accomplice instruction to the members. Indeed, the Court of Military Appeals has attempted "to make clear" that " '[i]nstruction on accomplice testimony *should* be given whenever the evidence tends to indicate that a witness adverse to the accused was culpably involved in a crime with which the accused is charged.' Para. 7-10, DA Pam. 27-9, Military Judge's Benchbook at 7-15 (1982)." *McKinnie, supra* at

144, n. 1 (cite omitted) (emphasis added). *United States v. Devine,* 36 M.J. 673 (N.M.C.M.R. 1992) (the failure of a military judge to give an accomplice instruction can result in plain error where the accomplice testimony is uncorroborated, and is self-contradictory, uncertain, or improbable.)

Moreover, contrary to the Air Force Court of Military Review's assertion, the primary case against the appellant did not rest on the testimony of Jennifer and the victim, thereby excusing the plain error. First, the lower court itself admitted, with regard to the victim, that "given the victim's limited recall of events, the prosecution case depended on the testimony of others." *Gittens,* 36 M.J. at 595.[1] Second, the testimony of Jennifer was so uncertain, inconsistent, and dubious that the prosecution needed the testimony of Rasberry, Lyons and Harris in order to try to convict the appellant, despite its contradictory and improbable nature.[2]

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[1] The victim's evidence, in fact, exculpates the appellant. Andrea's recollection of what occurred to her, although sketchy, nevertheless does contain some relevant evidence, evidence which contradicts some of Jennifer's testimony. Andrea does not remember the bed moving that night, and in fact could tell the bed was not moved at the time she felt the sharp pain in her behind. R. 186-87, 190. She also remembered hearing *two voices,* and not just one voice, something which does not square with the allegation the appellant was alone with her in the bedroom.

[2] Contrary to the assertion by the lower court that the accomplice testimony is "corroborated" by Jennifer's testimony, *Gittens,* 36 M.J. at 597, her testimony in many respects stands alone. Henderson, who was actually motioned to the door of Anna's room and witnessed someone engaging in sexual intercourse with Andrea, saw at least two people in the room, neither of whom were the appellant. R. 140, 142. In addition, at the time, according to Jennifer, that Harris tells her, "I can't believe what *they're* doing to [Andrea]," the appellant was not anywhere near Anna's bedroom. He was in the kitchen. R. 88. Ac-

For example, Jennifer's alleged identification of the appellant as being in Andrea's room after the door was opened is particularly suspect. At trial, for example, she is sure that the appellant is the person who was alone in that room. R. 93. In contrast, she admitted that when talking to trial counsel prior to the Article 32 hearing in this case, she was not so sure it was the appellant in that room. R. 104. Moreover, although she admitted it was "very dark" in that room, R. 103, with "no light at all," R. 92, Jennifer not only claims to have seen the appellant's white underwear, R. 92, but his *black* glasses as well—prior to the time the appellant allegedly walked past her into the hallway. R. 93.

Additionally, Jennifer claims to have seen the appellant after the door was opened between six and twelve inches at a point marked "x" in Appellate Exhibit II. R. 119. The only way to believe this testimony is to believe that Jennifer is somehow gifted with X-ray vision. Jennifer is also uncertain as to what exactly had said to her when Jennifer entered the room. At trial, Jennifer testified that Andrea had said "He hurt me. The black one, Bobby, . . . ," R. 105. At the Article 32 hearing it was "the black one was on top of me," and Jennifer had specifically told defense counsel, "I don't remember the word, 'Bobby,' " R. 115. Prior to the Article 32 it was "Bobby, the black one."

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cording to Harris, what she said was "there are guys back there 'pulling a train' on Andrea." R. 128. Rasberry and Lyons, and not the appellant, were thereafter discovered in Anna's room with Andrea. R. 84, 99. Lyon's testified that after comforting Andrea in the bedroom, he left and got everybody, including the appellant, out of the house. R. 172. There was thus no subsequent time that the appellant could have gone into the bedroom alone. In fact, only Jennifer placed the appellant in the bedroom alone and undressed with Andrea, and that was in the improbable scenario discussed *supra*.

Jennifer's testimony is also inconsistent not only with other evidence adduced at trial, but with common sense as well. Aside from the fact that Harris did not corroborate Jennifer's testimony that the bed in Anna's room, which allegedly was blocking the door, turned back into position 90 degrees perpendicular to the door as it was being opened, R. 128-29, this scenario as described by Jennifer defies belief. It defies belief that the bed which extended far down towards the end of the room, R. 101, and which was a tight squeeze in that room. R. 195, Def. Ex. A, B, could be moved 90 degrees in a matter of seconds as Jennifer alleged at trial, not to mention without disturbing the surrounding items in the room. R. 104. Add to that implausible scenario the fact that the appellant allegedly was responsible for moving that large bed in that tight space in that manner with his pants and underwear down around his knees, R. 95, 103-04, and Jennifer's story enters into the realm of fantasy.

Other details with respect to Jennifer's story also do not logically add up. Jennifer testified she supposedly "covered Andrea up" after discovering her in the room naked (with her sweater, tank top and bra all pulled up around her neck). She allegedly told Andrea as she covered her up, "*they're* not going to bother you anymore." R. 93, 94. One wonders, why the use of the word "they're" if the appellant was alone with Andrea as Jennifer claims. More revealing, however, is the fact that Andrea's testimony contradicts Jennifer's. When Andrea woke up, she testified that she was not covered but rather was still naked, in fact, "[she] looked down and saw [she] had no clothes on," and her "sweater, bra, and tank top were all pushed up." R. 187. Jennifer evidence did an extremely poor job, if at all, of comforting and covering her friend, an act she would have this Court believe. It is also hard to believe that if Andrea was screaming "at the top of her lungs" as alleged by Jen-

nifer, R. 90, that Andrea would not have woken up at that point or at least remembered this incident, despite her intoxicated state.[3]

In short, the failure of the military judge to give the accomplice instruction in this case cannot be excused by pointing to the inconsistent and improbable testimony of Jennifer.[4]

The military judge's *sua sponte* duty to give the accomplice instruction is also underscored by the manifest prejudice to the appellant resulting from his failure to do so. The members likely gave undue prejudicial weight to the accomplice testimony given by Harris (regarding the appellant being in the room with the complaining witness after Jennifer and he opened the door), by Lyons (that the appellant said he "got some" or "man, we ran a train on Andrea," the latter statement not being testimony or evidence but rather impeachment of its own witness by the prosecution), R. 173, and by Rasberry (seeing the appellant in the hallway after an unidentified person said "take it out, it's hurting," and that the appellant affirmatively answered when asked if he "got some"). That the above testimony was even offered by the prosecutor for

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[3] Jennifer's inconsistent, illogical, and contradictory testimony was perhaps brought on by guilt that she was responsible for allowing her friend to be placed in such a position, *see e.g.*, her admission that Harris had told her something had been going on or could be going on all night before she "finally took him seriously that night," R. 99; and her failure to report the incident to the police, R. 107.

[4] Unlike the defense attorney in *Gillette*, 35 M.J. at 470, the failure to give the accomplice instruction in this case was not induced by the defense attorney at bar, and thus the failure to give the accomplice instruction in this case should not be considered waived. Because the error, under the facts discussed *supra*, was so egregious, plain error analysis should be applied in this case and should not be considered waived. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

the members' consideration highlights the fact that the prosecution itself thought they were of critical importance to their case against the accused, especially in light of the weak testimony of Jennifer. *Cf., United States v. Dubose,* 19 M.J. 877, 880 (A.F.C.M.R. 1985). Moreover, the members were left to deliberate on the appellant's guilt in the face of this multiple and inconsistent testimony and the distinct possibility of mutual covering up between Lyons and Rasberry, "best friends," without the critical cautionary accomplice testimony instruction which recognizes "as a fact of human nature that, if two persons are involved in the same crime, each will frequently try to shift most of the blame to the other." *McKinnie, supra* at 144. This omission was thus plain error manifestly prejudicial to the appellant, rendering his trial unfair.

II. THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF THE APPELLANT, BY ALLOWING, OVER DEFENSE OBJECTION, THE TESTIMONY OF ANNA HUIZAR, A GOVERNMENT REBUTTAL WITNESS WHO SAT THROUGH THE APPELLANT'S ENTIRE COURT-MARTIAL PRIOR TO BEING CALLED TO THE STAND.

Shortly before the conclusion of the defense case, trial counsel approached the bench and informed the military judge that he desired to place Ms. Anna Huizar, the blood sister of Andrea, the complaining witness, on the stand as a rebuttal witness. R. 214. During the trial, Anna Huizar had sat with her mother and watched the proceedings. R. 215. Specifically, Anna told trial counsel, after Richard Williams testified, that she allegedly was present in the room during a phone conversation between Andrea and Williams, and that some remarks made by her sister were

supposedly never made. R. 215. Defense counsel objected, stating not only was Anna not contending that Andrea made a prior consistent statement, but that the whole reason for having an exclusionary rule is to prevent people who have heard prior testimony and then perhaps fabricate their own from taking the stand. R. 215.

The military judge then stated he was not going to ascribe "bad faith" to either side, thereby not precluding the ability of the witness to testify on the basis of the exclusionary rule. R. 216. After argument by counsel, he permitted Anna to testify whether or not she heard a specific statement made by Andrea Huizar going to consent. R. 218. Anna Huizar then testified she "recalled an occasion when" her sister received a phone call from Williams, R. 221, and that her sister did not "make the statement to which Airman Williams testified." R. 221. She admitted that she had not thought to repeat her "testimony" to anybody before the day she desired to testify, and that she had lived in the house with her sister Andrea since the incident. R. 223-24.

The military judge erred to the prejudice of the appellant by allowing Anna's testimony over defense objection. Mil.R.Evid. 615 provides for the exclusion of witnesses from trial proceedings "so that they cannot hear the testimony of other witnesses . . ." As noted by the United States Court of Military Appeals, the underlying purpose behind sequestration under Mil.R.Evid. 615 is "the belief that if witnesses were allowed to hear each other's testimony, the possibility of collusion or the unconscious melding of stories was too great." *United States v. Gordon*, 27 M.J. 331, 332 (C.M.A. 1989). The Air Force Court of Military Review found that the military judge did not abuse his discretion in allowing Anna's testimony, finding the testimony "relevant to rebut a claim of recent fabrication and [that it was] not collateral." *Gittens*, 36

M.J. at 598-99. The Court of Military Appeals held that, while Mil.R.Evid. 615 is applicable to rebuttal witnesses, "it can only be applied to known witnesses". 39 M.J. at 332. Since the Government did not know Andrea's sister could testify to any relevant issue until after Airman Williams had testified and Andrea approached the trial counsel, there was no error.

Contrary to the opinion of the Air Force Court of Military Review, the trial judge abused his discretion on several grounds. First, in this case, the possibility of collusion was extremely high. The complaining victim's sister, attempting to bolster a weak case against the appellant, one in which her parents no doubt wanted to see someone held accountable, decided after hearing a particularly damaging piece of evidence, to come forward and relate a story she had not told anybody before trial. Second, the military judge should have recognized and considered the fact that the "evidence" the prosecution was attempting to introduce would have served solely to unduly confuse the members and thereby prejudice the appellant as well. Even though Anna did not know who called who prior to the phone conversation she allegedly overheard,[5] R. 221, this evidence was allowed to go to the members as relevant evidence to "rebut" what Williams had said that Andrea, his girlfriend, had told him. For all the military judge knew, Anna could have overheard another conversation, not the one Williams testified about.

Finally, the military judge based his ruling upon an erroneous reading of the exclusionary rule when he held that the exclusionary rule was a remedy applied only in instances of bad faith on the part of trial participants. As

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[5] Andrea testified she called Williams and asked him if they had had sexual activity that she did not know about. R. 191. In contrast, Williams testified that he had called Andrea. R. 207.

noted *supra,* the exclusionary rule is not a prophylactic rule intended to police the behavior of trial participants. It is a general rule intended to prevent collusion or the unconscious melding of stories between witnesses who would otherwise be allowed to hear each other's testimony. *Gordon, supra* at 332; *See also United States v. Croom,* 24 M.J. 373, 375 (C.M.A. 1987) (exclusionary rule's purpose is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion). The military judge's erroneous belief that the bad faith of a trial participant was somehow involved in triggering the use of the exclusionary rule fatally undermined his ruling allowing Anna to testify. Had he properly applied the precepts behind the exclusionary bar to this case, the military judge would have realized that the prosecution's obvious end run around Mil.R.Evid. 615's sequestration rule should have been prohibited.

The opinion of the Court of Military Appeals is antithetical to fundamental notions of due process to the extent that it indicates that it is permissible for a trial judge to permit a witness to testify, notwithstanding the fact that the witness' testimony may be the direct product of testimony heard, or evidence produced, during the course of the trial, as long as there was no improper intent on the part of government counsel. Appellant would submit that the Court of Military Appeals has missed the point of this assignment of error completely. The intent of government counsel in such a circumstance has absolutely **no** bearing on the ultimate prejudice suffered by an appellant as the result of inevitably tainted, if not patently manufactured, evidence. Appellant would submit that the focus of the Court should have been on establishing a test for admissibility to be used by military and civilian judges in this unique type of situation which perpetually occurs in both military and civilian trials. Logically, such a test would

place the burden of proof on the party seeking to introduce the tainted evidence to show that the value of the proffered testimony, even with the assumed taint, was so necessary to that party's case that it should be admitted.

In *United States v. Ell,* 718 F.2d 291 (9th Cir. 1983), a case cited by the Court of Military Appeals dealing with the denial of sequestration requests, the *Ell* court noted:

> Witness sequestration cases present the sort of situation in which it is grossly unfair to place the burden on the defendant to establish prejudice. It may be impossible to tell how a witness' testimony would have differed had the defendant's motion to exclude been granted. Therefore, we hold that when a court fails to comply with Rule 615, prejudice is presumed and reversal is required unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence.

718 F.2d at 293-4. Appellant would submit it is similarly grossly unfair and a denial of due process for any court to use the standard adopted by the Court of Military Appeals. Instead, appellant would submit that this Honorable Court should adopt the test set forth by the *Ell* court, namely, prejudice should be presumed and such evidence should be excluded unless the moving party proves, beyond a reasonable doubt, that the testimony the moving party seeks to introduce is not the byproduct of the witness having been a bystander at trial, or is so necessary to the moving party's case that, even with the assumed taint, it is constitutionally required to be admitted. The only consequence of adopting such a bright line rule would be that counsel would be forced to do a better job preparing their cases for trial.

Due to the ruling of the military judge in the case *sub judice,* manifest prejudice is obvious. The appellant's right to a fair trial was severely undercut when the trial counsel was allowed to rebut a devastating piece of defense evidence, (Williams, the complaining witness's own boyfriend, admitted that Andrea did not even know if she had "wnated it or not," R. 207), with tainted and biased evidence whose confused nature could not have but been construed against William's veracity to the prejudice of the appellant. The appellant had the right to a fair trial in accordance with the Uniform Code of Military Justice and the Constitution of the United States. This prejudice cannot be swept aside by merely opining that this evidence was somehow relevant and noncollateral or that it was admissible because there was no bad faith on the part of government counsel.

CONCLUSION

The questions presented are genuinely important and affect not only petitioner, but the rights of millions of Americans serving in the armed forces. Petitioner asks this Court to resolve the issue of whether a judge is required to give an accomplice instruction when the state of the evidence in a case clearly indicates that key government witnesses are in fact accomplices. In addition, this court should also establish a bright line rule for all trial courts with regard to the practice to be followed when "surprise" witnesses have had an opportunity to hear the evidence in a case prior to testifying. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief Appellate Defense Division
Counsel of Record

ERIC N. EKLUND
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

August 1994

APPENDIX

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0432.
CRM No. 29227.

UNITED STATES, APPELLEE,

v.

ROBERTO A. GITTENS, SENIOR AIRMAN
U.S. AIR FORCE, APPELLANT.

Argued March 2, 1994.
Decided June 17, 1994.

Accused was convicted by a general court-martial, Kevin L. Daughtery, J., of attempted rape. The United States Air Force Court of Military Review, 36 M.J. 594, affirmed, and review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) defense failure to request accomplice instruction constituted waiver, and military judge's failure to give such an instruction sua sponte was not plain error, and (2) military judge's decision to allow witness' testimony, after sitting through all of the court-martial, was not an abuse of discretion.

Affirmed.

For Appellant: *Captain Eric N. Eklund* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse, Lieutenant Colonel Frank L. Spinner, Captain David D. Jividen.*

For Appellee: *Captain Jane M.E. Peterson* (argued); *Colonel Jeffrey T. Infelise* (on brief).

Opinion of the Court

Cox, Judge:

Senior Airman Roberto Gittens stands convicted of attempted rape.[1] We granted review of an issue involving a claim that the military judge failed, *sua sponte*, to give an accomplice instruction regarding three prosecution witnesses. In appellant's view, these witnesses were culpably involved in any offenses that may have been committed. The remaining granted issue concerns appellant's contention that the military judge improperly allowed the victim's sister to testify as a rebuttal witness. Up to that

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[1] Appellant was charged with rape, forcible sodomy, and adultery, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 920, 925, and 934, respectively, but was ultimately convicted only of attempted rape, in violation of Article 80, UCMJ, 10 USC § 880. He was sentenced to a bad-conduct discharge, confinement for 1 year, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence, and the Court of Military Review affirmed. 36 MJ 594 (1992).

We granted review of the following issues:

I

WHETHER THE JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, BY FAILING TO GIVE AN ACCOMPLICE TESTIMONY INSTRUCTION DESPITE THE FACT THAT SEVERAL WITNESSES WERE ACCOMPLICES.

II

WHETHER THE MILITARY JUDGE ERRED, TO THE [SUBSTANTIAL] PREJUDICE OF APPELLANT BY ALLOWING, OVER DEFENSE OBJECTION, THE TESTIMONY OF [THE VICTIM'S SISTER], A GOVERNMENT REBUTTAL WITNESS WHO SAT THROUGH APPELLANT'S ENTIRE COURT-MARTIAL PRIOR TO BEING CALLED TO THE STAND.

point in the proceedings, she had been in attendance at the court-martial and had observed the testimony. We hold that appellant waived the accomplice instruction and that the military judge did not err in permitting the sister's testimony.

I

The charges arose from a party appellant attended at the home of the 18-year-old victim, Andrea, a military dependent. Earlier that evening, Andrea went to the base non-commissioned officers' (NCO) club to meet her friend, Jennifer Williams, another military dependent. When the club closed, Andrea invited appellant and others to her house for a party; her parents and sister were away on a retreat at the time. At the party, many of the guests became intoxicated playing "quarters," a drinking game. The events of that night can be pieced together through the testimony presented at trial.

For the prosecution, Jennifer testified that she was drinking alcoholic beverages on the night in question. She related that Andrea drank several "shots" playing "quarters," then went to lie down because she was tired. While Jennifer was cleaning the kitchen, Dexter Harris, a civilian, told her to go with him back to a bedroom where Andrea was resting. Dexter said to Jennifer, "I can't believe they're doing that to her." When Jennifer got to the bedroom, Andrea was on the bed; Corey Lyons, a civilian, was on his knees holding Andrea's hand, and Melvin Rasberry, a civilian, was in the back of the room. Jennifer was concerned that the men were "trying to mess with" Andrea and thinking appellant was Andrea's friend, she asked him to go to the bedroom and make the other men leave. Appellant went to the bedroom. Believing that appellant was with Andrea and that Melvin, Dexter, and Corey were out of the bedroom, Jennifer resumed cleaning up from the party.

While she was cleaning the living room, Jennifer heard Andrea scream, "You get off of me. You're hurting me." She hurried to the bedroom but was unable to open the door because the bed had been pushed in front of it. When the bed was moved and Jennifer was able to open the door, she saw appellant with his pants and underwear down; Andrea was laying on her back, naked from the waist down. Jennifer was "positive" that only Andrea and appellant were in the room. According to Jennifer's testimony, appellant left the room at that point, and Andrea

> was crying. She said, "I can't believe he did this to me. He's supposed to be my friend." She said, "Bobby. . . . He was on top of me.". . .

Appellant went by the name, "Bobby," and no one else with that name, or any variant thereof, was identified as being at the party.

Dexter Harris was the next prosecution witness. He testified that he was "very" intoxicated at Andrea's party, but he remembers going three times to the bedroom in which Andrea was resting. The first time, he saw appellant and two other men in the bedroom with Andrea. The next time, appellant and Andrea were the only people in the room; appellant was sitting at the foot of the bed, and Andrea was lying on her stomach on the bed. The third time Dexter went to the room was with Jennifer, when the bedroom door was blocked by the bed. Dexter saw appellant in the room on that occasion and thought others were present, but he could not be sure due to his level of intoxication. On cross-examination, he testified that he recalled telling Jennifer that "there were guys back there 'pulling a train on' " Andrea.

Sergeant Cecil Henderson was also at the party. He testified that he was a designated driver that evening and that he had had very little to drink. Toward the end of the party, a commotion arose, and someone motioned for him to come to the bedroom. As he reached the bedroom door, someone inside the room instructed the person who had been motioning Henderson to shut the door, and the door "slammed" in Henderson's face. Before the door closed, Henderson was able to see a young lady, lying on her stomach on the bed. She was saying, "You're supposed to be my friend. You're supposed to be my friend." Someone behind Andrea appeared to be having sexual intercourse with her.

Melvin Rasberry testified reluctantly as a prosecution witness. He was a friend of appellant and Corey. He testified that he was extremely drunk on the night in question. At one point, as he was walking to the bathroom, past the bedroom where Andrea was resting, he heard her say, twice, "Take it out, it's hurting." Melvin "just kept on walking to the bathroom." When he came out, he saw appellant "in the hallway" and Corey in the bedroom "comforting" Andrea. Melvin thought "Dexter was at the end of the bed" at that time.

When Melvin, Corey, and appellant were ready to leave, they went to look for Dexter. (The four friends had also arrived at the party together.) According to Melvin, they found Dexter "playing with himself" at the edge of the bed where Andrea was. They took Dexter to the car. In the car on the way home, appellant said that he "got some." According to Melvin, Dexter asked, "Was it as good as mine?,' . . . [i]mplying that . . . [h]e had 'got some,' " too. Despite having been repeatedly questioned by authorities, Melvin had never made this representation about Dexter prior to the court-martial.

Corey Lyons, another of appellant's friends, testified that he played "quarters" at Andrea's house. When he went to tell Andrea good-bye, she was "hysterical." Corey thinks Dexter might have been passed out in the corner of the bedroom. According to Corey, as he, Melvin, and appellant were leaving the house, appellant said, "Man, we ran a train on" Andrea, and appellant said that he "got some."

Andrea was the last prosecution witness. She testified that she remembered playing "quarters" but did not recall how she got to the bedroom. She was awakened by "a real sharp pain in [her] behind" and told whoever was there to leave her alone. She testified that she heard two voices, but only knew what one was saying. That person said, "Hurry up . . . I'm next." Andrea woke up the day after the party to find herself naked from the waist down, with her sweater and bra pushed up around her neck. She was "spotting" and "felt like sticky."

The defense called Airman Richard Williams as a witness. He had been a boyfriend of Andrea; and he, too, was at the party. He testified that he called Andrea the day after the party, and she told him what she suspected had happened. According to Williams, Andrea also stated, "[T]he bad thing about it is I don't know if I wanted it or not."

Andrea's sister was in attendance at he court martial, and she heard William's testimony. During a break in the proceedings, the sister, who had had no previous contact with the prosecution, approached the prosecutor and told him that William's testimony was false. The prosecution promptly called the sister as a witness in rebuttal of Williams' trial testimony. Over defense objection, she testified that she was with Andrea throughout the phone call from Williams and that Andrea never said what Williams claimed she said about possibly consenting.

II

Though he did not do so at trial, appellant now contends that the evidence shows that his friends, Melvin, Corey, and Dexter, were culpably involved in any offenses committed on May 12, 1990, and that the military judge, *sua sponte*, should have given a separate accomplice instruction. Appellant does not here suggest what instruction the military judge should have given; however paragraph 7-10, Military Judges' Benchbook at 7-15 (Dept. of the Army Pamphlet 27-9 (1 May 1982)), contains an example. *See* Appendix.

Instead, the military judge gave the following general instruction on witness testimony:

> Now, you have the duty to determine the credibility of the witness. In performing this duty, you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, and any friendships or prejudices towards either party. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have to either side; and how each witness may be affected by the verdict.
>
> In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie.
>
> Taking all these matter into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth.

In *United States v. Gillette*, 35 MJ 468 (1992), we held:

> [w]henever the evidence raises a reasonable inference that a witness may have been an accomplice or claims to have been an accomplice of the accused, *and upon request of either the Government or defense*, the

> military judge shall give the members a cautionary instruction regarding accomplice testimony. First, the members shall be instructed how to determine whether a witness is an accomplice. Second, they shall be given the standard instruction regarding the suspect credibility of accomplice testimony.

Id. at 470 (emphasis added).

Following *Gillette*, a defense failure to request an accomplice instruction constitutes waiver, albeit there may be a case where a judge's failure to give such an instruction would be "plain error." RCM 920(f), Manual for Courts-Martial, United States, 1984; *United States v. McFarlin*, 19 MJ 790, 794 (ACMR), *pet. denied*, 30 MJ 314 (1985); *cf. United States v. Lee*, 6 MJ 96, 97 (CMA 1978). Plain error is obvious and substantial error that prejudicially influenced the deliberations of the members. *United States v. Fisher*, 21 MJ 327, 328 (CMA 1986). This is not such a case.

Here, while there is evidence that others were in the bedroom with Andrea at various points, it is far from clear that any were in the room when appellant allegedly was having sex with Andrea. In addition, it is completely unclear who those persons might have been, or whether they also had sex with Andrea or otherwise participated in appellant's offense. The test for "determining whether a witness in an accomplice is whether the witness himself could have been convicted of the same crime for which the defendant is being prosecuted." *United States v. McKinnie*, 32 MJ 141, 143 (CMA 1991), *citing United States v. Scoles*, 14 USCMA 14, 19, 33 CMR 226, 231, 1963 WL4842 (1963). On this bizarre record, the evidence simply fails to suggest which, if any, of these individuals might have been appellant's accomplices.

Moreover, the military judge gave a general witness-credibility instruction which plainly informed the members to take into consideration, *inter alia,* each witness' "sincerity . . . friendships or prejudices towards either party [and] the extent to which each witness is either supported or contradicted by other evidence," as well as "how each witness may be affected by the verdict." Given the testimony presented here, the court members could have had few illusions about the character and circumstances of appellant's friends—none of whom identified appellant as having sex with Andrea. For whatever weight their testimony may have carried, the members could hardly have failed to view it with great suspicion. Appellant's waiver is not absolved by plain error.

III

The remaining issue concerns the fact that Andrea's sister was allowed to testify in rebuttal after sitting through all of appellant's court-martial. Noting that Mil.R.Evid. 615, Manual, *supra*, provides for the sequestration of witnesses, appellant contends the military judge erred in allowing Andrea's sister to testify.

Mil.R.Evid. 615 provides for the exclusion of witnesses "[a]t the request of the prosecution or defense" or "*sua sponte*" by the military judge "so that they cannot hear the testimony of other witnesses." (Emphasis added.) The purpose of the "rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion." *United States v. Croom*, 24 MJ 373, 375 (CMA 1987), quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir.1981) (citations omitted); *see also United States v. Gordon*, 27 MJ 331, 332 (CMA 1989).

While Mil.R.Evid. 615 is applicable to rebuttal witnesses, **see United States v. Ell**, 718 F.2d 291 (9th Cir.1983), clearly, it can only be applied to *known* witnesses. *United States v. Cortwright*, 528 F.2d 168, 176 (7th Cir.1975). Here, the Government did not know Andrea's sister could testify to any relevant issue after Airman Williams has testified and Andrea's sister approached trial counsel.[2] Under these circumstances, we see no abuse of discretion in the military judge's decision to allow Andrea's sister's testimony. *United States v. Croom*, 24 MJ at 375.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX

1 May 1982 DA PAM 27-9

7–10. Accomplice Testimony.

Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness adverse to the accused was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this

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[2] It is unclear from the record if a formal order of sequestration was entered by the military judge. He did state, however, "Let me direct that you keep an eye on the spectator area and if a potential witness does enter the court, let me know so that we can have that person step out." We will assume this was such an order. *See Generally United States v. Ell*, 718 F.2d 291 (9th Cir.1983).

advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances. (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____)). The testimony of an accomplice, even though it may be ((apparently) (corroborated) and) appanently credible, is of questionable integrity and should be considered by you with great caution.

In deciding the believability of (*state the name of the witness*), you should consider evidence including but not limited to (*specify significant evidentiary factors indicating that the witness may have been an accomplice*).

Whether or not (*state the name of the witness*), who testified as a witness in this case, was an accomplice is a question for you to decide. If (*state the name of the witness*) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice whose testimony must be considered with great caution.

(Additionally, the accused cannot be convicted on the uncorrobated testimony of a purported accomplice *if* that testimony is self-contradictory uncertain, or improbable).

(In deciding whether the testimony of (*state the name of the witness*) is self-contradictory, uncertain, or

improbable, you must consider it in the light of all the instructions concerning the factors bearing on a witness' believability.)

(In deciding whether or not the testimony of (*state the name of the witness*) has been corrobated, you must examine all the evidence in this case and determine if there is independent evidence which tends to support the testimony of this witness. If there is such independent evidence, then the testimony of this witness is corrobated; if not, then there is no corroboration. (You are instructed as a matter of law that the testimony of (*state the name of the witness*) is uncorrobated).)

Reference:

Paragraph 74*a*(2), MCM, 1969 (Rev.)

U.S. COURT OF MILITARY APPEALS

ACM 29227.

UNITED STATES

v.

SENIOR AIRMAN ROBERTO A. GITTENS,
FR151-66-6743 UNITED STATES AIR FORCE

U.S. Air Force Court of Military Review.

Sentenced Adjudged 1 March 1991.
Decided 25 Nov. 1992.

Accused was convicted by a general court-martial, George Air Force Base, California, Kevin L. Daughtery, J., of attempted rape. The United States Air Force Court of Military Review, Heimburg, J., held that: (1) evidence supported conviction; (2) men at party with accused could be found to be accomplices; and (3) victim's sister was not subject to sequetration order.

Affirmed.

Appellate Counsel for the Appellant: Captain David D. Jividen (argued), Colonel Jeffrey R. Owens, Lieutenant Colonel Terry J. Woodhouse, and Major Mary C. Yastishock.

Appellate Counsel for the United States: Captain Jane M.E. Peterson (argued), Colonel Richard L. Purdon, Lieutenant Colonel Brenda J. Hollis, Lieutenant Colonel Jeffery T. Infelise, Major Paul H. Blackwell, Jr., and Captain James C. Sinwell.

Before DIXON, MCLAUTHLIN, and HEIMBURG, Appellate Military Judges.

OPINION OF THE COURT

HEIMBURG, Judge:

In a contested trial before members, appellant was convicted by a general court-martial of attempted rape.[1] His approved sentence consists of a bad-conduct discharge, confinement for 1 year, and reduction to airman basic. He has assigned seven errors on appeal. Finding none persuasive, we affirm.

The Factual Sufficiency of the Evidence

Appellant argues the evidence is factually insufficient to sustain the finding of guilty of attempted rape. While the testimony at trial was conflicting and some witnesses appeared unable or unwilling to recall events, we find the evidence sufficient to support conviction.

The charges in this case arose out of a party held in the wee hours of a Sunday morning at the on-base residence of an 18-year-old female dependent, A.H., identified as the victim. Not surprisingly, the victim's parents and siblings were away for the weekend. Testimony indicated that a number of people, most of them male, congregated at the house after the NCO Club closed. Many of those present were playing "quarters," a drinking game in which the winner was privileged to declare who next would down a shot of tequilla or "E & J," identified as a brandy.

The victim, who already had consumed some alcoholic drinks that night, joined the "game" briefly and was required to down four shots in rapid succession. She

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[1] Appellant was arraigned on charges of rape, forcible sodomy and adultery (he was married to another person at the time.) The trial judge granted a motion for a finding of Not Guilty to forcible sodomy charge at the conclusion of the prosecution case.

remembered nothing after that until she awoke some time later, face down on her sister's bed, with a "real sharp pain in my behind." She believed there were two voices in the room, but she could identify neither of them. One said, "Hurry up . . . because I'm next." The room was dark, with the door closed and no lights on. When she next awoke, it was Sunday afternoon, she was mostly unclothed, felt "dirty," and believed she had had sex with someone. Initially, she did not know what had happened to her, but, after discussing events with others who had been present, decided she had been raped and reported that on Thursday. Although her memory was foggy, she knew she never consented to any sex act.

Given the victim's limited recall of events, the prosecution case depended on the testimony of others. Chief among them was J.W., a close friend of the victim who was present at the house all night. J.W. testified she was cleaning up the kitchen after the victim went to the bedroom to lie down. D.H. called her to the bedroom, exclaiming, "I can't believe what they're doing to her." Entering the room, J.W. saw C.L., M.R., and the victim, who was lying on the bed. J.W. believed the men in the room were "trying to mess with her or something," so she went to the kitchen area and asked appellant to "go get those guys out of the room with [the victim]." Appellant went toward the bedroom. Five to ten minutes later, as she was cleaning up the living room, J.W. heard the victim's voice, "screaming at the top of the lungs saying, 'You get off of me. You're hurting me.' " She and D.H. went to the bedroom and found the door closed. She couldn't turn the knob or enter the room. Eventually, when the door opened slightly, she saw the bed was pushed against the door. When she was allowed to enter, appellant was alone with the victim in the room; his pants and underwear were down. He pulled his clothing back on and left the room saying to J.W., "She's calling for [R.W.]." J.W. saw

that the victim was nude from the waist down, with her sweater, bra and tank top pulled up "around her neck." J.W. "covered her up" and shut the door. Shortly, M.R., D.H., C.L. and appellant left the house. J.W. stayed until 0800.

D.H. had been drinking heavily that night. His testimony as to the chronology of events and other details did not match J.W.'s exactly, but he corroborated significant events. He recalled going to get J.W. once with the message that guys were "pulling a train on" the victim. When he and J.W. went to the bedroom, she couldn't get the door open at first, but finally "Busted it open" and found appellant in the room with the victim. He thought there were others in the room, but wasn't certain who or how many. He denied seeing appellant "doing anything" of a sexual nature to the victim, even touching her.

M.R., an unwilling witness who had been drinking enough that night to be "intoxicated", corroborated J.W.'s testimony and provided significant admissions by appellant. Very late, "morning or early morning," he was going past a bedroom to the bathroom and heard, "Take it out, it's hurting" spoken twice. He continued to the bathroom. When he returned after five minutes he saw appellant in the hallway, C.L. and D.H. in the bedroom. C.L. was "comforting" the victim. Soon he, C.L., D.H. and appellant went to the car. In the car, C.L. said, "That was pretty messed up what happened," and "Bobby [appellant] said that he had got some" and spoke about pushing the bed up against the door.

C.L., another reluctant witness who admitted having "too many" drinks, did not agree with the time sequence of other witnesses. He testified that, shortly before he and others left the house, the victim was "hysterical" in the bedroom and he "tried to comfort her." He also recalled appellant, in the car, said, "I got some." After attempts

at refreshing his recollection as to more of appellant's statements in the car failed, the judge admitted as past recollection recorded C.L.'s prior sworn statement to the Air Force Office of Special Investigations (AFOSI) agent, "Bobby's words were, 'Man, we ran a train on [A.H.]' "

R.W., the victim's former boyfriend, testified as a defense witness on the issue of consent. He had been at the party. On Sunday afternoon he spoke with the victim on the telephone, and the subject of what happened to her the night before came up. The victim wanted to know if he "knew what happened and who it was," and he told her no. Then she said a friend had told her she could claim rape, "But, [R.W.], the bad thing about it is I don't know if I wanted it or not." R.W.'s testimony was contradicted by the victim, who denied saying anything about consent or lack thereof to him. The victim's sister also testified in rebuttal that she was sitting next to the victim during the telephone conversation, and the victim made no such statement.

During oral argument, counsel for appellant asked us to consider the legal as well as factual sufficiency of the evidence. We have done so. Having considered the facts in the light most favorable to the prosecution, we find sufficient evidence on each element to convict. *Jackson v. Virginia,* 443 U.S. 307, 309, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Moreover, we ourselves are convinced of appellant's guilt beyond a reasonable doubt. Article 66(c), U.C.M.J.; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A.1987).

Failure to Give Accomplice Testimony Instruction

Appellant urges us to find plain error in the trial judge's failure, *sua sponte*, to give an accomplice testimony instruction concerning the testimony of C.L., M.R., and

D.H. Appellant recognizes that, absent plain error, trial defense counsel's failure to request such an instruction would waive objection to its omission. R.C.M. 920(f); *United States v. Lee,* 6 M.J. 96 (C.M.A. 1978).

The term "accomplice" has been given a broad definition in military law, and includes persons who are "culpably involved in the crime with which accused was charged," regardless of whether they are subject to prosecution. *United States v. Scoles*, 14 U.S.C.M.A. 14, 33 C.M.R. 226, 231 (1963). Under the facts of this case, we find that C.L., M.R. and D.H. could have been considered to have been associated with appellant in the commission of attempted rape. Upon request, appellant was entitled at trial to an instruction on accomplice testimony allowing the court members to determine for themselves whether the witnesses were accomplices. *United States v. Gillette*, 35 M.J. 468, 470 (C.M.A.1992).

Our next question is whether it was plain error for the trial judge to fail to give such an accomplice testimony instruction, absent a request by the defense. Plain error will only be found where the accomplice testimony constitutes the sole evidence as to some of the elements or constitutes virtually the entire case for the prosecution. *Lee*, 6 M.J. at 97; *United States v Sanders*, 34 M.J. 1086, 1092-3 (A.F.C.M.R.1992). The primary case against appellant rested on the testimony of J.W. and the victim. Moreover, the testimony of the accomplices, if so they were, was corroborated by this testimony.[2] We find no plain error.

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[2] The testimony of the accomplices was also not entirely incriminating. In many significant respects, it tended to undermine appellant's culpability. Trial defense counsel ably walked a tightrope: he used accomplice testimony to point out conflicts with J.W.'s testimony and, at the same time, attacked it as contradictory and confused. Arguably, it was not to the defense's advantage to label any of the purported accomplices as such, because calling them

Exclusion of Defense Witnesses

Appellant claims prejudicial error when the trial judge refused to allow the defense to produce the testimony of two persons who had been at the party and were later interviewed by agents of AFOSI. Trial defense counsel proffered that the wirnesses would "go further to establish a pattern by the OSI of unduly influencing witnesses, of attempting to steer the evidence in this case, failing to investigate proper leads that might have been exculpatory for the defense." Trial defense counsel argued the testimony was relevant "because this was an individual who was present at the scene, was a part of that same investigation, and that goes to show specifically a pattern on the part of the OSI which may tend to show that our impeachment of the other witnesses was valid." After assuring himself the two were not witnesses on the merits, the trial judge refused to allow the testimony, ruling that "methodology," presumably AFOSI methodology was "not relevant and material to the credibility of the other witnesses."

The judge's ruling was entirely proper. The defense had elicited, on cross-examination of four witnesses, evidence that witnesses felt AFOSI techniques were coercive and singled out appellant to the exclusion of other suspects. Such evidence goes to the weight to be afforded those witnesses' testimony.[3] Trial defense counsel's attempt to bolster this credibility evidence was collateral and not material, as the trial judge ruled.

"accomplices" would tend to highlight the evidence showing his client to be culpably involved in group sexual activity with the victim.

[3] *United States v. McCoy*, 31 M.J. 323, 328 (C.M.A.1990).

Rebuttal Testimony of Victim's Sister

At the conclusion of the defense case, trial counsel called the victim's sister to rebut the testimony of R.W. Appellant argues that the trial judge's failure to follow the witness sequestration rule of Mil.R.Evid. 615 was an abuse of discretion which prejudiced his right to a fair trial.

The sister had been in the courtroom during most of the trial and heard the evidence. Trial counsel advised the military judge the sister approached him during the previous recess and told him she was present when the victim spoke with R.W. on the telephone, and the victim did not make the remarks questioning whether she had consented to which R.W. testified. Trial counsel averred the sister was a surprise witness, and that the government had not planned any rebuttal to R.W.'s testimony until just moments before the court reconvened. The military judge declined to attribute "bad faith" to the prosecution. He allowed the sister's testimony, carefully limited not to permit hearsay.

We first note that we do not face a defense waiver, for, while neither party invoked the sequestration rule, the trial judge invoked it *sua sponte*, as permitted by Mil.R.Evid. 615. Nevertheless, the rule is not, as appellant has argued, an "exclusionary rule" of evidence, and it is within the trial judge's discretion to permit a witness to testify who has heard previous testimony.[4] *United States v. Croom*, 24 M.J. 373, 375 (C.M.A.1987); *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir. 1980). Prior military decisions have permitted expert witnesses [5] and criminal investi-

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[4] Indeed, Mil.R.Evid 615 itself provides for three exceptions: the accused; designated "representatives" of the U.S.; and "persons whose presence is shown by a party to be essential to the presentation of the party's case."

[5] *United States v. Croom, supra.*

gators,[6] to testify after observing all or a portion of the trial.[7] Even where a witness has knowingly violated a trial court's sequestration order, the witness ordinarily should be allowed to testify, but the court may impose sanctions, such as informing the jury of the witness's actions, permitting cross-examination on the violation, and even considering contempt. *Holder v. United States*, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893).

Here we have no willful violation of the military judge's sequestration order, in that the victim's sister was not a known witness. The trial judge found the prosecution was not guilty of "bad faith," and we agree. The circumstances shown in the record of trial support the prosecutor's contention that the sister was truly a "surprise" witness. A sequestration order can only apply to a known witness. *United States v. Cortwright*, 528 F.2d 168, 176 (7th Cir.1975).

Military judges have wide latitude in controlling the presentation of rebuttal evidence. Mil.R.Evid. 611(a). The testimony of the sister was on a limited issue: whether the victim made a prior inconsistent statement about consent. The trial judge applied the balancing test of Mil.R.Evid. 403 and concluded that the probative value of her testimony outweighted the danger of confusion of the issues or misleading the members. We concur. The victim's consent or lack thereof was a critical element of proof. The victim testified she did not consent, but had practically no recall of the events, and did not make an official complaint until four days later. R.W. testified the victim

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[6] *United States v. Scott*, 13 M.J. 874, 877 (N.M.C.M.R.1982).

[7] But the trial judge may require the witness to testify out of order to prevent contamination of the testimony. *See generally, In re United States*, 584 F.2d 666 (5th Cir.1978). *Accord* S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual*, 714 (3d ed. 1991).

questioned, on the day after the events, whether she may have consented. Under these facts, the trial judge could properly find, as he did, the sister's testimony that the victim did not make a prior inconsistent statement was relevant to rebut a claim of recent fabrication and was not collateral. In addition, the trial judge carefully limited the sister's testimony to the fact that she did not hear the purported remarks by the victim. He did not permit the witness to testify as to any of the telephone conversation she may have overheard. The defense was given latitude to explore possible bias and motive to fabricate during cross-examination. Under these facts, the judge did not err in allowing this testimony.

We have considered the remaining assignments of error and find them without merit. Upon examination of the entire record, the findings and sentence are correct in law and fact. Accordingly, the findings and sentence, as approved, are

AFFIRMED.

Chief Judge DIXON and Senior Judge MCLAUTHLIN concur.

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